No. 15918

United States
COURT OF APPEALS
for the Ninth Circuit

BANKERS UNION LIFE INSURANCE COMPANY, a corporation,

Appellant,

vs.

JOHN LYLE MONTGOMERY,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, District Judge.

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STATEMENT OF PLEADINGS and FACTS DISCLOSING JURISDICTION

Plaintiff-Appellee, a citizen of the State of Oregon, brought this civil action in the Circuit Court for Multnomah County, Oregon, to enforce the provisions of a life insurance policy issued by Defendant-Appellant on the life of Appellee's wife (R. 4-8). The amount in

controversy, exclusive of interest and costs, exceeds $3,000 (R. 3, 4-8, 10-14). Pursuant to 62 Stat. 937 (28 USCA Sec. 1441) Appellant removed the case to the United States District Court for the District of Oregon which had jurisdiction under 62 Stat. 930 (28 USCA Sec. 1332) and 62 Stat. 937 (28 USCA 1441).

The appeal is from the final judgment of the District Court (R. 21-22) and this Court has jurisdiction by virtue of 62 Stat. 929, 65 Stat. 726 (28 USCA Sec. 1291) and 62 Stat. 930 (28 USCA Sec. 1294).

STATEMENT OF THE CASE

Appellee does not controvert Appellant's Statement of the Case.

AS TO APPELLANT'S STATEMENT OF THE EVIDENCE

It is felt that an erroneous impression created by Appellant's Statement of the Evidence should be corrected. Appellant would have the Court believe Mrs. Montgomery was taken to Holladay Park Hospital in a condition of serious mental difficulty and placed in a specially locked room (Appellant's Brief 6). This was not the case and the impression Appellant seeks to produce by these statements is far from the facts shown by the record (R. 60, 67, 73-75, 82-83, 155).

AS TO APPELLANT'S SPECIFICATION OF ERROR NO 1

Summary of Argument

In determining whether the trial court erred in denying the motion for a new trial, the motion must be regarded as having admitted the truth of Appellee's (plaintiff's) evidence, and of every reasonable inference of fact that may be drawn in Appellee's favor from the evidence. It is the sole province of the jury to settle disputes as to the material facts and the reviewing court cannot weigh or evaluate the evidence. The motion for a directed verdict cannot be granted if there is any substantial evidence in the record to support the verdict. *Cays vs. McDaniel, et al,* 204 Or. 449, 452, 283 P.2d 658. *Phillips vs. Colfax Company, Inc.*, 195 Or. 285, 292, 302-303, 243 P.2d 276, 245 P.2d 898.

Appellant apparently misconceives the issue presented by its first Specification of Error. Although its Statement of the Evidence (Appellant's Brief 3-12) sets forth evidence supporting its contention in the trial court, the issue is not whether there is evidence contrary to the jury's verdict. The issue raised by the first Specification of Error is, rather, whether there is any substantial evidence in the record supporting the jury's verdict that none of the answers covered by the verdict was wilfully false. The Supreme Court of Oregon in *Phillips vs. Colfax Company, Inc.*, 195 Or. 285, 243 P.2d 276, 245 P.2d 898, summarized the function of the reviewing Court in this situation as follows:

"We have frequently and consistently defined the powers and limitations of this court when called upon to review alleged errors predicated upon a trial court's refusal, as here, to grant motions of nonsuit or motions for a directed verdict in law actions. In *Fish vs. Southern Pacific Co.,* 173 Or. 294, 301, 143 P2d 917, 145 P2d 991, we said:

" ' . . . In considering the propriety of these rulings, the motions must be regarded as having admitted the truth of plaintiff's evidence, and of every inference of fact that may be drawn from the evidence. The evidence itself must be interpreted in the light most favorable to plaintiff. *McCall vs. Inter Harbor Nav. Co.,* 154 Or. 252, 59 P2d 697. Where the evidence conflicts, the court may not infringe upon the function of the jury by seeking to weigh or evaluate it, but is concerned only with the question of whether or not there was substantial evidence to carry the case to the jury and to support the verdict. *Ellenberger vs. Fremont Land Co.,* 165 Or. 375, 107 P2d 837; *Allister vs. Knaupp,* 168 Or. 630, 126 P2d 317.'

"Also see *Smith vs. Industrial Hospital Ass'n.,* 194 Or. 525, 242 P2d 592, 596; *Edvalson vs. Swick,* 190 Or. 473, 478,227 P2d 183; *Dudleston vs. Chiravollatti,* 184 Or. 405, 415, 198 P2d 858. Such inferences favorable to plaintiff may also be drawn from defendant's as well as plaintiff's evidence. *Smith vs. Industrial Hospital Ass'n.,* supra."

In accordance with these principles, the verdict and evidence should be examined.

Argument

By the Special Interrogatories the jury was asked to consider the answers given by Dr. and Mrs. Montgomery to questions 27(e), 28, 29 and 33 on Appellant's

application for the policy of insurance it issued on Mrs. Montgomery's life (R. 15-18, Ex. 1, R. 227). Each of these questions, as it appeared on the application, together with the answer given by the Montgomerys, was set forth in the interrogatories (R. 15-18). The jury was then asked, as to each question and answer thus set out: "Was such answer wilfully false?"; "Was such answer material?"; and "Did the defendant (Appellant) rely on it?" (R. 15-18). As to question 29, the jury was also asked, "Was such answer false?" (R. 17). In each case, that is, as to each of the questions put by Appellant in the application, and as to each of the answers of the Montgomerys thereto, the jury found that the answer was not wilfully false, and that the answer was material and relied upon by Appellant (R. 15-18). Also, in the case of question 29, the jury found that the answer was not false (R. 17).

Question 27(e) asked whether Mrs. Montgomery had, had been told she had, or had been treated for: epilepsy, mental derangement, nervous prostration, syphilis, paralysis, convulsions, or fainting spells (R. 227). Answering this, Dr. or Mrs. Montgomery wrote in "NO", and underlined "nervous prostration (R. 159-161, 227). This was done to note an exception (R. 161). That is, they knew that Mrs. Montgomery had not had, had not been told she had, nor had been treated for any of the conditions noted in 27(e), with the exception of nervousness (R. 161). Mrs. Montgomery had been treated in the spring of 1951 by Dr. Coen, a psychiatrist, for a condition of which Dr. Coen spoke to her husband in terms of nervousness, nervous exhaus-

tion, prostration (R. 157). At that time, Dr. Montgomery was told by Dr. Coen that it would be very good for Mrs. Montgomery to get outside and to garden and to relax (R. 157). Dr. Dickel, a psychiatrist associated with Dr. Coen, testifying as a psychiatrist, and assuming that he had been told that his condition was schizophrenia, paranoid type, which was the diagnosis of Mrs. Montgomery's condition in the spring of 1951, would have indicated "nervous prostration" in answering 27(e) (R. 57-58). Based on the hospital records on Mrs. Montgomery, Dr. Lee, Appellant's medical director, who examined and approved her application on behalf of Appellant, stated that she would not come under the classification of "nervous prostration" (R. 109-110, 112-113). This underlining of the term, however, put Dr. Lee on notice that Mrs. Montgomery might be suffering from some mental or nervous disorder within the meaning of the term, although he said he "didn't put too much on that" because of the answer to question 28 (R. 114-115).

Question 28 asked the applicant to name all causes for which she had been treated in the last ten years, giving details and including particulars of any "yes" answers to question 27(e) (R. 227). In answer to question 28, two causes for which Mrs. Montgomery had been treated were noted, i.e., nervousness and a suspension of the uterus (R. 227). In each case, in addition to other details of these two causes for which she had been treated, in accordance with the exact language of the question, the name of the *attending* physician was noted (R. 227). In the case of the nerv-

ousness this was Dr. Cooney who, in the spring of 1951 referred her to Dr. Coen for consultation, advise and/or treatment (R. 41, 44). Appellant's medical director, Dr. Lee, agreed that Dr. Cooney would still be the attending physician under these circumstances, and also stated that in his examination of the application (he personally examined and approved Mrs. Montgomery's application for the Appellant (R. 100)) it would have made no difference whether Dr. Cooney or Dr. Coen was noted as the attending physician (R. 118). Dr. McGee, Appellant's medical examiner, also noted Dr. Cooney as the attending physician for Mrs. Montgomery's nervous condition (R. 144-146). This was so in spite of the fact that Dr. McGee, who had examined other life insurance applicants for Appellant, completing their applications, and who was therefore familiar with the questions and the information sought thereby, knew at the time of the examination that Mrs. Montgomery had been treated by doctors other than Dr. Cooney for the nervous condition (R. 144-146).

Question 29 asked if the applicant had ever consulted any physician for any ailment not included in the previous answers in the application (R. 227). This basically is the same as question 10 E in part 2 of the application (the declaration to the medical examiner) (R. 230). Question 33 asked for any additional facts or special circumstances known to the applicant which might affect the risk of insurance on the applicant's life, and of which the insurer should be advised (R. 227). In accordance with the request following this question, that if there were no such facts or circumstances the appli-

cant should state "None", Dr. and Mrs. Montgomery stated "None" (R. 159, 227).

The verdict of the jury was, specifically, that none of these answers was wilfully false, and further, that the answer to question 33 was not false (R. 15-18).

Mrs. Montgomery's condition in the spring of 1951 was related by her husband to a menopausal situation despite her relatively youthful age of 31 years, since, oddly enough, the later women begin their menses, the earlier they go through the change of life (R. 153). Mrs. Montgomery had not begun her menses until she was 17 and had two sisters who had gone through very early menopausal changes—in their late twenties or early thirties (R. 153). While Dr. Cooney was treating Mrs. Montgomery she periodically experienced difficult menstruations and would become depressed as her menses approached (R. 68-69). After her treatment at Holladay Park Hospital in April of 1951, and up until her accidental death in January, 1956, Mrs. Montgomery's health was good, although she continued to have some trouble during menstruation (R. 156-157). At the time of making the application Mrs. Montgomery's health and physical condition were good (R. 162). She had the ability to do all of her housework, manage a household including two children, shop, and to go out socially and on vacations with her husband (R. 162).

The reaction described by Dr. Coen's diagnosis of Mrs. Montgomery's condition in the spring of 1951 is frequently manifested by women in the menopausal or premenopausal years, some temporarily, some a little

longer, and some occasionally chronic (R. 54). Any number of symptoms result from this condition, symptoms which are *very common* for women experiencing or about to go into the menopause (R. 113). Appellant's medical director, Dr. Lee, applied to the symptoms exhibited by Mrs. Montgomery the term "psychosis," which, when associated with the menopause, is insurable and is considered a fair risk (R. 114). As Appellant's medical examiner (in addition to his own private practice, he examines approximately 2000 applicants for Appellant's policies each year (R. 109)), Dr. Lee does not pay much attention to nervousness referred to in an application if it is connected with menopause or surgery (R. 120). From the information he had on Mrs. Montgomery's application, including part 2 thereof, the declaration to Dr. McGee as Appellant's medical examiner, Dr. Lee was satisfied that the application was all right and that no further investigation was necessary (R. 118-119). Dr. Cooney, who was noted on the application as the attending physician for the nervous condition, was not contacted by Appellant with reference to the application (R. 78, 114-115, 119).

As the medical examiner for Appellant for this policy, Dr. McGee found Mrs. Montgomery, at the time of his examination of her, to be in good health (R. 110, 131) and he recommended acceptance of the risk (R. 231). Using Appellant's policy application, which was brought to his office by Mrs. Montgomery, Dr. McGee, on October 14, 1954, gave her a complete physical examination, showing on the application what he did and found (R. 130). He found Mrs. Montgomery to be in

good health, with no indications of mental disease or illness, or of nervous tension (R. 131, 144-145). There was no question in Dr. McGee's mind when he examined and talked with her that there was anything wrong with her (R. 148). The tests made by Dr. McGee were those indicated on Appellant's application (R. 131, 144-145). Dr. McGee had no particular instructions, no form of instructions, no rules or procedures, from the company relating to the physical examination of applicants for life insurance (R. 146).

Yet, in the teeth of Dr. McGee's testimony, Dr. Lee, who at no time saw or examined Mrs. Montgomery, answering a hypothetical question by deposition in Denver, Colorado, stated that she was not in good health in October, 1954, the month of Dr. McGee's examination (R. 107)! Furthermore, in direct contradiction of Dr. Coen's diagnosis of Mrs. Montgomery's condition (R. 90-91), and based solely on the hospital records, Dr. Lee said Mrs. Montgomery's condition in the spring of 1951 was "severe" (R. 117)! Dr. Lee has had no specialized training either in the field of psychiatry or in the study of nervous and mental diseases or ailments (R. 109).

Finally, Dr. Montgomery testified that in the overall discussions had with everyone involved in filling out the application, he and Mrs. Montgomery did their best to put down what they honestly believed her condition had been and was (R. 169). There was nothing they were attempting to conceal from Appellant in the application (R. 162).

Appellant's authorities do not support the contention made by its Specification No. 1, i.e., that the record here fails to show any substantial evidence supporting the jury's findings. In *Mutual Life Insurance Company vs. Chandler,* 120 Or. 694, 252 P. 559, the Court said at 120 Or. 701 (252 P. 561):

> " . . . In this case there is no dispute and the Court also found that the assured did, indeed, consult other physicians and was treated by them, and that information was withheld from the company. . . ."

Despite this finding the trial court denied the insurance company's prayer for cancellation of the policy, and, on appeal, was reversed. The testimony there was uncontroverted that the insured, almost contemporaneously with or at least a short time before making the application, had consulted a physician other than the one named in the application and had taken treatment from him for tuberculosis. In the application, the insured showed only that his tonsils had been removed and gave the name of the doctor performing the operation.

In the instant case the jury's finding was contrary to that of the court in the *Chandler* case.This verdict is supported by substantial evidence. The finding by the trial court in the *Chandler* case in favor of the insurer distinctly distinguishes it from this case.

In *Gamble vs. Metropolitan Life Insurance Co.*, 92 S.C. 451, 75 S.E. 788, the reviewing court held merely that the question of misrepresentation should have been submitted to the jury, since, although there was evidence of misrepresentation in the application, the trial

court nevertheless directed a verdict for the insured. In the present case, the existence of evidence in Appellant's favor is not determinative of its first Specification of Error. That there is substantial evidence in support of the verdict, however, is determinative of this point in Appellee's favor.

Plaintiff in *Comer vs. World Insurance Co.*, 65 Or. Adv. Sh. 745, 318 P.2d 916, conceded the falsity of the answers to the questions in the application but by the doctrine of equitable estoppel tried to show that the insurer should not be permitted to use against him the application he signed (65 Or. Adv. Sh. 747-748, 318 P.2d 918-919). The Oregon Supreme Court examined the evidence there solely for the purpose of determining whether it established any basis for the equitable estoppel (65 Adv. Sh. 770, 318 P.2d 928). There is no admission here that there were false representations. That issue here was determined by the jury in Appellee's favor.

The trial court in *Martin vs. Metropolitan Life Insurance Co.* (CA 5, 1951), 192 F.2d 167, directed a verdict in the insurer's favor. Answering a question in the life insurance application as to what physicians he had consulted or had treated him in the last five years, the insured said, "None." Within four years of the signing of the application the insured had been frequently treated by a doctor for chronic bronchitis, had been treated by another doctor for prostatitis and urethral stricture, and had been treated by still another doctor for a tumor of the kidney. The reviewing court said:

> "On this evidence, Billingslea's [the insured's] unequivocal answer to the question as to what physicians he had consulted or been treated by in the last five years, 'None', was palpably untrue. . . ."

The reviewing court rested its affirmance of the directed verdict for the insured on the clear falsity of the answer touching the other doctors, holding that the concealment, although not a wilful fraud, was material to the risk, and justified avoiding the contract as a matter of law. Certainly the facts of the *Martin* case distinguish it from the evidence now before the court.

There was a finding by the District Court in *Parker vs. Title & Trust Company* (CA 9, 1956), 233 F.2d 505 that the plaintiff (who was alleged to have concealed material facts from the title company in applying for a title insurance policy) had knowledge of the defect in the title, alleged to have been concealed from the title company. On appeal this court held the finding was supported by sufficient evidence. In the instant case the jury found there were no wilfully false answers in the application, a finding which is likewise supported by sufficient evidence. Appellant's contention regarding half truths is inapplicable where, as here, both Appellant's medical director and its medical examiner agree that noting only the attending physician was a proper answer to question No. 28. Dr. Lee was satisfied with the application. "Nervous prostration" was explained by the reference to treatment for nervousness by the attending physician and further investigation was neither indicated nor undertaken.

The facts were *undisputed* that the insured obtained

reinstatement of his insurance policy by false and fraudulent representations, knowingly and intentionally made by him in the case of *New York Life Insurance Co. vs. Yamasaki,* 159 Or. 123, 126, 78 P.2d 570. The ruling of the Oregon Supreme Court affirming the decree canceling the policy has no application to the facts here.

Northwestern Mutual Life Insurance Co. vs. Cohn Bros. (CCA 9, 1939), 102 F.2d 74 closely parallels the instant case. The appellee-insured had a verdict and judgment in the District Court in its action as beneficiary on a life insurance policy. Appellant's defense was that the insured had given false answers to questions asked by its medical examiner. In part 2 of that application was a question asking whether, since birth, the insured had suffered any disease of the liver. The insured was shown to have had a disease of the gall bladder. There was testimony that the gall bladder was regarded by the medical profession as a part of the liver. However, there was also testimony that laymen would not so regard it. The trial judge denied a requested instruction for a directed verdict for the insurer on the ground of a wilful false statement warranting avoidance of the policy. He left it to the jury to determine the question whether the word "liver" as used in the question included the gall bladder. This Court, in affirming the jury's verdict said:

> " . . . Since there was an ambiguity in the use of the word 'liver' in a question to be answered by a layman, here was no basis for an instruction for a verdict for the insurance company which had prepared the questionnaire."

It was held there was no error in refusing to instruct the jury to return a verdict for the insurer.

Attention is next directed to 5 of Appellant's argument (Appellant's Brief 25-26). The "limited physical examination" administered by Appellant's medical examiner was just as indicated by Appellant's application form (R. 145). Appellant gives its medical examiners no particular instructions, no form of instructions, no rules and procedures and asks for no information other than that appearing on its application form (R. 146). Dr. McGee's testimony was that Mrs. Montgomery answered all questions which *he put to her,* not that she answered every question herself on part 2 of the application (R. 136). Dr. McGee himself put the name of Dr. Cooney, the attending physician, on part 2 of the application (R. 146).

Furthermore the "limited physical examination" contention is effectively countered by language from *Stipcich vs. Metropolitan Life Insurance Co.,* 277 U.S. 311, 48 S. Ct. 512, 72 L. Ed. 895. This language appears in the *Stipcich* opinion immediately following the first paragraph quoted by Appellant therefrom (Appellant's Brief 27). The Supreme Court says:

> "Concededly, the modern practice of requiring the applicant for life insurance to answer questions prepared by the insurer has relaxed this rule to some extent, since information not asked for is presumably deemed immaterial. (Citing) . . ."

Furthermore, the language which Appellant omitted from the *Stipcich* opinion (preceding and following the second paragraph quoted at page 27 of Appellant's

Brief) makes it apparent the Court was concerned with the particular factual situation in that case. After applying for the insurance and before delivery of the policy, Stipcich had a recurrence of a duodenal ulcer, of which he did not notify the company. The evidence was uncontradicted that after the application was submitted Stipcich consulted two doctors who told him it was necessary to have an operation to remove the ulcer. The United States Supreme Court reversed the ruling of the trial court, which ruling had refused the beneficiary's offer of proof that the insured communicated this information to the company's agent who had solicited the policy.

It is submitted that the jury's findings, that none of the answers covered by the special interrogatories was wilfully false, were and are fully supported by the record in this case, and that therefore the District Court did not err in denying Appellant's motion for a directed verdict.

AS TO APPELLANT'S SPECIFICATION OF ERROR NO. 2

Summary of Argument

Dr. McGee's knowledge at the time of the medical examination that Mrs. Montgomery had been in Holladay Park Hospital was relevant and material to show what information he had when he completed part 2 of the application, and, having that information, how he did complete the application.

Argument

Contrary to the impression Appellant tries to leave, Dr. McGee stated *positively* that he knew, when Mrs. Montgomery was in his office for the examination, that she had been in Holladay Park Hospital (R. 144). This was uncontradicted. Dr. McGee could not remember whether the information was discussed with Mrs. Montgomery at the time of the examination (R. 145). Notwithstanding this information, he "just put down the one attending physician" (R. 146), just as Dr. and Mrs. Montgomery did in part 1 of the application (R. 227). Counsel for Appellee, in discussing Dr. McGee's testimony before it was admitted stated:

> "Mr. Davis: But, you see, based upon the cases, and I didn't mean to be disrespectful about it, but all the application form says, it says attending physician. It does not ask for any hospitalization. It does not ask for anything." (R. 80).

Thus the testimony which Appellant says is immaterial shows to the jury the knowledge which its medical examiner, who had done work for Appellant before—who had filled out applications for Appellant for other people—had at the time of the examination, and having that knowledge, how he completed the application. Added to the doctor's examination of Mrs. Montgomery and the matters he noted in part 2 of the application, this evidence completes the picture, showing the jury all that the medical examiner knew when he made the examination for Appellant and completed its application form.

Nothing in the decision in *Henderson vs. Union*

Pacific Railroad Co., 189 Or. 145, 219 P.2d 170, the only case cited by Appellant on this phase of the case, indicates a contrary result. To be sure, the Oregon Supreme Court there says at 189 Or. 160, 219 P.2d 177:

> " . . . Before a case can be submitted to a jury in this jurisdiction the proof of material issues must have the quality of reasonable certainty, and a finding dependent upon conjecture and speculation will not be permitted to stand. (Citing)."

However, there is no conjecture or speculation in Dr. McGee's testimony that he knew of the Holladay Park Hospital situation. Without the slightest reservation, the testimony was that Dr. McGee knew, at the time of the examination, of the Holladay Park Hospital situation (R. 144).

Appellant's argument on this point does not present any basis for the exclusion of the testimony.

STATEMENT REGARDING ATTORNEY FEES ON APPEAL

Under Oregon law, inasmuch as the District Court allowed attorneys fees to Appellee, should this Court affirm the judgment, Appellee is entitled to such *additional* sum for attorney fees as this Court shall adjudge reasonable on this appeal: ORS 736.325(2); *Horwitz vs. New York Life Insurance Co.* (CCA 9, 1935), 80 F.2d 295; *American Surety Co. of New York vs. Fischer Warehouse Co., et al* (CCA 9, 1937), 88 F.2d 536; *Michigan Millers Mutual Fire Insurance Co. vs. Grange Oil Co.* (CA 9, 1949), 175 F.2d 544.

CONCLUSION

It is respectfully submitted that, interpreted in the light most favorable to Appellee, and drawing every reasonable inference therefrom, there is sufficient evidence, including all of Dr. McGee's testimony, all of which was properly admitted, to support the jury's verdict. This verdict, and the judgment based thereon, must therefore be affirmed and this Court is respectfully requested to make an allowance to Appellee for his attorney's fees on this appeal.

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